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Calendar

March 1—Denver Bar Association regular monthly luncheon meeting, 12:15 P. M., Chamber of Commerce dining room.

April 5—Denver Bar Association regular monthly luncheon meeting, 12:15 P. M., Chamber of Commerce dining room.

May 3—Denver Bar Association regular monthly luncheon meeting, 12:15 P. M., Chamber of Commerce dining room. This is the annual election meeting for the election of officers, trustees, and members of the Board of Governors of the Colorado Bar Association, and is the final regular monthly meeting until fall.

What's Wrong with the Professions?

By EDWARD B. WILCOX

Of Chicago, President of the American Institute of Accountants. An address delivered at a banquet of the Colorado Society of Certified Public Accountants, April 22, 1947, at which members of the Colorado bar were guests.

It may not seem entirely gracious to address representatives of two honored professions on the subject of what is wrong with them, but such is my respect for both of them that I think an inquiry will disclose only faults that are mostly superficial, and virtues that are relatively profound. A prominent philosopher, statesman, and educator from my part of the country once said that the trouble with government was that there were too many people mixed up in it. That is probably what is wrong with the professions. I have heard it said that accounting couldn't possibly be as difficult as some think, because—well, just look at the people that are in it. Of course you all know that a public accountant is only a bookkeeper who drinks out of a job. And in case you don't know the description of him popularly attributed to Elbert Hubbard, here it is:

> The typical auditor is a man past middle age, spare, wrinkled, intelligent, cold, passive, non-committal, with eyes like a codfish, polite in contact, but at the same time unresponsive, cold, calm and damnably composed as a concrete post or a plaster of paris cast; a human petrification with a heart of feldspar and without charm of the friendly germ, minus bowels, passion or a sense of humor. Happily, they never reproduce and all of them finally go to Hell.

On the other hand, I have been reliably informed that the law business

is the backbone of the legal profession, and that the theory of our courts is that if two liars are set to tripping each other up, the truth will emerge. I have also heard not so long ago about the lawyer who won a difficult case and received the favorable decision while his client was out of the city. The lawyer telegraphed in some jubilation. "Justice has prevailed." His client wired back: "Appeal at once." And when the lawyers get me down, I take some comfort in thinking about a course in accounting offered to lawyers by the School of Commerce at Northwestern University in Chicago some years ago. The course had the inspired title, "Accounting for Lawyers."

Perhaps the trouble with the professions is that they set high standards for people who are only human. It would be a fair question to ask, "What is a profession?", and it may be an equally fair one to ask why people seem to want to be regarded as professional. The prestige of the term apparently does not apply in the field of athletics, nor have I ever observed that membership in the oldest profession is regarded as strictly honorable. Alexander Woolcott has contributed a story to the anthology of professionalism. It begins with a touching picture of an old broken-down tragedian sharing a park bench with a bedraggled and unappetizing street walker. "Ah Madame," says the tragedian, "Quelle ironia! The two oldest professions in the world—ruined by amateurs."

Webster tells us that a profession is a calling in which one has acquired some special knowledge or skill and offers to use it in instructing, advising, or serving others. But in this day of specialized occupations, that would include almost everybody. There is undoubtedly some professional nature to the services of barbers, manicurists, hairdressers, pullman porters, and book salesmen, but we need a narrower definition than that. Services become more highly professional when they require so much training and experience that the layman who depends on them cannot measure their value, and must rely on his confidence in the professional man. It then becomes an obligation of the profession to set up standards of practice and codes of ethics to protect laymen from the incompetent and the unfit. And I think the highest degree of professional attitude is achieved when the ideal of service is placed ahead of desire for reward. The profit-motive is appropriate to business but not to the professions. The ideal of service seems to me to be evidenced in the legal profession by acceptance of the obligations and restrictions placed on one who becomes an officer of a court. In public accounting it finds its highest expression in an acknowledgment of a primary obligation to the entire public, whenever an opinion is furnished with respect to financial statements.

It is gratifying that the professions of law and accounting have recognized that service comes ahead of reward. A National Conference of Lawyers and Certified Public Accountants created in 1944 by the American Bar Association and the American Institute of Accountants adopted as an initial resolution the following objectives:

1. To further the development of professional standards in both professions.

2. To encourage cooperation between the two professions for the benefit of each and of the public.

3. To consider misunderstandings involving fundamental issues between the two professions and recommend means for disposing of them.

4. To devise ways and methods of expanding the usefulness to the public of both.

5. To seek means of protecting the public against practice in these respective fields by persons not qualified to serve the public.

The language of those objectives put service ahead of profit and is professional in the highest sense. Then, coming closer to the areas of cooperation and conflict, which are only opposite sides of the same coin, the national conference adopted another resolution:

WHEREAS, Lawyers and certified public accountants are trained professional men, licensed by the several states, and required to bring to their public service qualifications both as to competency and character; and

WHEREAS, The American Bar Association and the American Institute of Accountants have adopted codes of ethics to assure high standards of practice in both professions:

BE IT RESOLVED, In the opinion of the National Conference of Lawyers and Certified Public Accountants:

1. That the public will be best served if income tax returns are prepared either by certified public accountants or lawyers.

2. That it is in the public interest for lawyers to recommend the employment of certified public accountants and for certified public accountants to recommend the employment of lawyers in any matters where the services of either would be helpful to the client; and that neither profession should assume to perform the functions of the other.

3. That certified public accountants should not prepare legal documents such as articles of incorporation, corporate by-laws, contracts, deeds, trust agreements, wills, and similar documents. Where in connection with such documents questions of accountancy are involved or may result, it is advisable that certified public accountants be consulted.

This resolution, like the one setting forth objectives, is on a high professional level of service. It recognizes that law and accounting naturally supplement one another by bringing different points of view and different backgrounds of training to the solution of common problems, and it seeks to maintain the individual nature of those different services so that they may both be of greatest value. Every lawyer or accountant who places service ahead of profit will endorse that resolution.

One of the fruits of the last war is the laboratory experience of lawyers and accountants, working together in matters of public service. They met and worked together in devising the legal and accounting framework of our tre-

mendous war production. In cost determination, renegotiation of war contracts, and contract termination, lawyers and accountants served the government and learned increasing respect for each other. And our government has learned more about using them both than it ever knew before, so that it now seems to have adopted a permanent policy of calling on these two professions as a matter of course whenever problems in their fields arise in public affairs. And they have not stopped arising. It is doubtful that revisions of utility regulation, to cite one example where legal and accounting problems are closely interwoven, will ever be attempted without help from both groups. And it is probable that no corporation laws which necessarily include legal requirements and accounting terminology, will ever be drafted without aid from the legal and accounting professions. And this aid will be, as it has always been, purely service without hope of reward.

Possibly this unpaid service may lack charm to some of us. I am reminded of the bridesmaid who said to another bridesmaid, "Well, the groom certainly got a prize." "Did he", said the other, "What was it?" But I think the test of the truly professional point of view is in the eagerness with which opportunities for service are welcomed, and I think the record set by lawyers and certified accountants, is of great credit to them both.

In the service of our clients the opportunities for lawyers and accountants to supplement one another, to the ultimate advantage of the client, are broad and varied. The field of wills, estates, and trusts affords one of these opportunities. The drawing of the original document, probably a will or a deed of gift, is unquestionably a job for a lawyer. But if the resulting trust estate is at all involved, this original instrument will require accounting interpretation. It would be well, therefore, to have an accountant collaborate at the outset. Thereafter the job of auditing to verify accountability is obviously in the field of accounting, but as legal interpretations of transactions are required, the lawyer should collaborate. Similarly mortgage indentures, profit sharing agreements, and percentage leases are legal documents, involving legal liabilities and consequences in which the accountant is not versed, but they also contain accounting terminology and require accounting interpretation. The mortgage indenture which specifies maintenance of an ill-defined working capital is apt to be as productive of trouble as one with a defective title. The profit sharing agreement which is vague as to the determination of profit to be shared, or worse, which attempts an unworkable definition of it, is just a bad job. And a percentage lease based on profits, for example, of a chain store unit, which omits to say whether or how general overhead may be prorated against the individual store, simply paves the way to controversy. Neither a lawyer nor an accountant can handle such matters alone with safety to his client's interest.

But these are only a few of the common fields where law and accounting come together. In mergers and tax-free reorganizations both legal and accounting experience are required. The preparation of a corporate charter is a

legal job, but an accountant can help in determining a natural business year, probably much more advantageous than one selected by the blind process of writing down December 31. And perhaps most important of all are those areas of service where the accountant is the expert witness or arbiter, providing that independence on which both parties in any situation may rely, while the lawyer has the role of advocate for his client. All of these areas of service and many more, offer opportunities for cooperation by which nobody is hurt and everybody benefits. It would seem that lawyers and accountants would be constantly calling on each other for help in the affairs of their clients, and that their own interests would engender the utmost goodwill toward each other. And, in fact, this is my own experience, and that of most accountants whom I know.

But as between the organized professions there is an unhappy area of conflict in the income tax field. This seems to arise largely from the view that income tax practice really belongs to lawyers but has fallen into the hands of accountants because the legal profession ignored it in its earlier years, and the accountants picked it up. To the best of my recollection I have never encountered a lawyer in connection with my practice as an accountant, who held this view, but I have encountered bar association committees that held it. And obviously that view leads to the conclusion that this lucrative field should be restored to those to whom it rightfully belongs. Because this conflict is so regrettable between the professions which have so much in common and such great cause for harmony, I wish to speak for a moment about the assumption that I think underlies and causes it.

This assumption is basically that income taxation lies in the field of law because the tax is levied by virtue of a statute. But clearly when men pursue specialized callings they have to be in a position to advise clients about the law which is directly applicable to the work they are called on to do. An architect, for example, when he draws plans, has to be familiar with a multitude of statutes and rules and regulations and their interpretations by administrative agencies and courts, and he has to discuss these matters of law with his client, and advise him about them. The same might be said of engineers, chemists, real estate brokers and many others. The question about income tax practice, therefore, is not whether it is affected by law, but whether it is primarily a matter of law.

Our first income tax laws were difficult unworkable things defining income and deductions in most unrealistic ways, and creating a threat of prolonged and involved confusion in the determination of taxes. One of the earlier evidences of cooperation between lawyers and accountants was the group of volunteers who aided Congress in curing this situation by drafting the Revenue Act of 1917 and the regulations under it. In these regulations, again and again, controlling recognition was accorded to approved standard methods of accounting as the basis for determining taxable income. It was this law and these regulations which really placed income tax practice squarely

in the field of accounting, not the fancied alertness of accountants. And the necessity for this step became evident from the failure of prior attempts to define taxable income by law, instead of by reference to generally accepted accounting principles. Taxation based on income, is therefore clearly an accounting problem, and knowledge of income tax laws, regulations, and decisions is a necessary part of the training of accountants.

It might be argued that much of the ground gained in 1917 has been lost, and that income taxation has become increasingly statutory and judicial. There is some truth in this, but to a considerable extent that is what is wrong with income taxation today. There is an interesting article on this very point entitled "Tax Accounting Incongruities", by J. K. Lasser in the March 1947 number of the Journal of Accountancy. Here the author lists examples of bad accounting which have become established in the determination of taxable income. Even a brief summary of that list will show how far afield we have gone.

A contested expense item is not deductible.

Excessive depreciation on assets sold cannot be corrected.

Receipts are taxable even though they may have to be returned.

Income received in advance is taxable even though there are unfulfilled obligations to perform future services.

Reserves required by proper accounting are denied.

Discounts on sales are not deductible until the customer pays his bill.

Salesmen's commissions are not deductible if contingent on collection, even though the related sales were taxable.

Those are the items listed by Mr. Lasser as bad accounting in the rules applicable to taxpayers on an accrual basis. I have chosen this list rather than the one referring to taxpayers on a cash basis because the latter is seldom adopted by corporations, and has little relation to good accounting anyway. It is a fundamental rule of accounting that income be determined by a process of matching costs and expenses against related revenues. This is the rule which is violated by these examples. And the examples are predominantly the work of courts and the Board of Tax Appeals which is now a court. These are among the things that make us complain today about the inequities and complications in our tax structure, and their cure lies in the restoration of income determination for tax purposes to the field of accounting where it logically belongs, and where it was clearly placed in 1917.

Oddly enough we find endorsement of this view by the Supreme Court of the United States in its decision in the Dobson case handed down on December 20, 1943. The court said in part:

"After thirty years of income tax history the volume of tax litigation necessary merely for statutory interpretation would seem due to subside. That it shows no sign of diminution suggests that many decisions have no value as precedents because they determine only fact questions peculiar to particular cases. Of course frequent amendment of the statute causes continuing un-

certainty and litigation, but all too often amendments are themselves made necessary by court decisions. . . . Our modern income tax experience began with the Revenue Act of 1913. . . . The law was an innovation, its constitutional aspects were still being debated, interpretation was just beginning, and administrators were inexperienced. . . . Precedents had accumulated in which courts had laid down many rules of taxation not based on statute but upon their ideas of right accounting or tax practice. . . . But conflicts are multiplied by treating as questoins of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law."

It seems to me that these words go even further than recognition that determination of income for tax purposes is inherently a part of the field of accounting. I think they charge the accounting profession with a duty to help in the establishment of a sound national tax program and policy—a duty which the American Institute of Accountants has long recognized. For many years the institute has urged Congress to appoint a non-partisan tax commission, on which accountants among others would serve, to develop a program of tax simplification and to establish a sound and consistent tax policy. But if this public duty rests on the accounting profession, there can be no question as to the place of accountants in income tax practice.

On the other hand, there are parts of the field of income taxation which clearly require the services of lawyers. Questions of domicile, validity of marriage, construction of wills or other legal documents on which tax liability may depend, and research requiring knowledge of law outside the tax law itself, should be handled by lawyers. Sometimes there are problems in the preparation of tax returns which have no relationship to determination of income. An example of this, although an outdated one, was the surtax on undistributed profits which we had in 1936 and 1937, in the case of a corporation legally unable to pay dividends. And it scarcely needs saying that the prosecution of tax cases in courts of law is the business of lawyers, not accountants. But the selection of experts to render professional services in the tax feld should always be made from the single standpoint of maximum safety and service to clients, and no other consideration should be controlling.

It is at this point that I come closest to my announced topic, "What's Wrong with the Professions," because considerations of the public interest may easily be perverted into self-seeking. Certainly any proposal that rights to practice in an income producing field be limited to a restricted group, may well be suspect. And the professions, like Caesar's wife, must be above suspicion. Rights, privileges, and immunities accorded professions are only justifiable to the extent that they are in the public interest. When they are turned to uses of personal aggrandizement, they fail in their purpose, becoming only smug abuses of power. And privilege and prestige will most surely be lost if they are guarded over-jealously with forgetfulness of their purpose. The professions depend on public confidence. To be maintained that confidence

must be deserved. But it will be lost if the professions engage in unworthy jurisdictional disputes which seem designed to obtain privileges for some rather than protection for others.

The American Institute of Accountants has recommended uniform state accountancy legislation intended to limit the practice of one aspect of public accounting in a way which may appear to violate the principles I have just stated. I want to talk about this recommended legislation for a few moments both because I hope you will join me in the belief that the position of the institute is soundly based on the public interest, and also because I think it affords an illustration of the optimum extent of restriction on rights to practice.

When a public accountant furnishes an opinion on financial statements it is with the expectation that third parties and the public generally will place reliance on that opinion even though the persons doing so had no voice in the selection of the accountant, and may have no knowledge of his qualifications. And the public accountant acknowledges a primary duty to this unseen audience. It is therefore in the public interest that only qualified and responsible persons be permitted to render this particular type of service. Since the best available mark of fitness is the C.P.A. degree, it is the recommendation of the American Institute of Accountants that this activity be regulated by law and restricted to certified public accountants, subject only to additional registration of others already in practice. But it is not proposed to regulate or restrict practice in any other part of the field of public accounting. It might be argued that some of these other parts of the field should also be regulated because clients can be victimized by incompetent services, but in those cases the argument is neither so clear nor so strong. Third parties are not involved, and the client selects his own accountant on the basis of confidence in him. It is doubtful that limitation of his right to make such a choice could be justified, or that it would do more good than harm. The accounting profession, therefore, has suggested only what seems clearly essential in the public interest, and has avoided that area in which motives might appear to be mixed.

In all of this discussion I have alluded to what might be called a public relations aspect. This is important, not so much as salesmanship of our services that we may become rich, but fundamentally because the value of our services depends on public confidence. It goes without saying that that confidence must be based on merit, but merit is not enough. To attain maximum usefulness we must be understood, appreciated, and trusted. Realizing this the American Institute of Accountants recently caused a small pilot survey to be made in which 216 highly placed executives including bankers, general businessmen, manufacturers, labor leaders, and investment analysts were interviewed on their attitudes and beliefs concerning various professional groups. We found out what they thought of accountants, and in the process we also found out what they thought about lawyers and some others. While this survey was too small to be entirely conclusive, I think you may be interested in some of its high lights.

When asked about professional groups these executives thought first of physicians and second of lawyers. Certified public accountants stood sixth in a list of fifteen. Perhaps this is even better than the accountants might have expected because their professional status is relatively new. Teachers were regarded as the group maintaining the highest standards; certified public accountants were second, and lawyers were third. The teachers stood high because they were regarded as idealistic, altruistic, ethical, and important to the community. It may come as a shock to some of you that certified public accountants considerably outranked lawyers on the ground that accounting was effectively controlled by laws, professional organizations, and other means. The lawyers, on the other hand, were criticized as being interested only in fees and private gains, and willing to do anything to please an employer. The principal criticism directed at certified public accountants was that they were interested only in their work, and participated but little in community life. Possibly that bears out Elbert Hubbard's idea of us. Accountants were regarded as highly ethical, and most of those interviewed believed that a C.P.A.'s certification on a financial statement was pretty strong evidence that the statement was complete, accurate, and impartial. When doubts were expressed they were mostly on the grounds that the accountants' investigations were lacking in thoroughness.

When Robert Burns offered up his prayer that some power give us the gift to see ourselves as others see us, he probably had not heard of opinion surveys. But his prayer has been answered. It must be remembered that the summary of findings I have just given you is based on a very small number of interviews, and yet I think it is highly probable that a larger number would show similar results. But it is another matter to decide whether these opinions of us fairly reflect our faults and virtues, or whether they indicate that we are misunderstood. I think both of these possibilities are true to some extent, and that is what is wrong with the professions. It's really quite simple. We need only to correct our faults, improve our virtues, and make known the truth. And although that simple task is tremendous, it is worthy of all the effort it may take, because our opportunities are so great.

It may be presumptuous in a layman to tell lawyers where their opportunities lie, but I remember the stirring words of President Conant of Harvard, a few years ago, when I heard him award degrees to graduates of the law school. He said, "I now declare you competent to practice in the field of those wise restraints which set men free." We in this country pay a high price in political mediocrity and governmental inefficiency, for our civil liberties and our popular control of government. I think it is the great opportunity of the legal profession to see that that price is not paid in vain, that a government of laws, not of men, truly serves our people, and that the restraints of law lead always to freedom.

The opportunities of the accounting profession are of a different nature,

but they are no less far reaching. It holds in its hands the conscience of the business community in this country. It is the guardian of our business ethics. Individual businessmen may from time to time chafe at restrictions and confuse a reasonable desire for freedom with a longing for a license to cut too many corners. It is the responsibility of the independent public accountants, in so far as financial representations of businessmen are concerned, to see that everything is kept upright and square. Ours is an economy in which freedom of action is still cherished as a right in the field of business and is believed by many to contain the essential elements of continuing and growing prosperity. One of the great reasons for confidence in this economic scheme is that it has itself created the accounting profession. The independent certified public accountant as the insurer of integrity in financial representations, has been developed by the need which has been felt within what we generally call our free enterprise system.

When Christ spoke from the mountain to his disciples he said, "Ye are the salt of the earth; but if the salt have lost its savour, wherewith shall it be salted? It is thenceforth good for nothing but to be cast out and to be trodden under foot of man." That could have been said of us.

But if we succeed in meeting the need for integrity and dependability in financial representations, and if we continue to adapt ourselves to the growing and changing needs of the business world which we serve, then we will be providing one essential ingredient in the scheme of American economy which is necessary to stability and prosperity. And anything which can do this increases the probability of a successful solution of the greatest crisis that the world has ever seen. A stable and prosperous America can be a foundation for world credit and world trade, and credit and trade can create those healthy conditions throughout the world which are essential to peace. American economic stability and prosperity will answer the question which the world is asking today, whether economic collapse is a price which our form of economy must pay for peace. And if we can prove that it isn't we need have no fear from the battle of ideologies that rages across the frontiers of the world today.

There really isn't very much wrong with the professions. But the opportunities that face us are so great that we may well pause in humbleness before them, and question whether we are equal to them. Certainly we have no excess capacities to waste in quarrels between ourselves. Nor have we anything to gain. Rather, by joining in service to that community in which all men live, the professions of law and accountancy can make great contributions to the building of a better world than we have known.

Another View of the Judiciary Committee's Plan

A Reply to Judge Clements

By PETER H. HOLME, JR.,
of the Denver Bar

Author's note: Since the foregoing article went to press, I have received the word of Judge Clement's death. From my acquaintance with Judge Clements, I feel sure he would be willing and anxious that the article written in answer to his last publication should be published as written and without apology. Judge Clements was a sincere and forceful debater, and gave his opponents full opportunity to be heard. I am sorry that the said circumstances of his death must make mine the last word in this debate.

In the December number of DICTA appeared an article by Judge Clements, Judge of the County Court of Delta County, criticizing the plan of the Judiciary Committee of the Colorado Bar Association for improvements in the Colorado judicial system. Judge Clements wrote with such taste and restraint that the generalities of his criticisms may have been submerged in the reader's mind by the charm of his writing. Therefore, I feel called upon to make a few rejoinders.

The judge's article was in two parts: The first, expressing his objections to the committee's plan for non-partisan selection of judges through the use of nominating commissions and appointment by the governor and also of the committee's proposed compulsory retirement of judges who have attained age 75; the second part expressing Judge Clements' ideas of what new laws are needed in connection with the judiciary.

In his criticism of the committee's plan, the judge makes two main points: First, that the use of nominating commissions to select candidates from whom the governor must appoint a judge to fill a vacancy is undemocratic and radical, because it takes away from the people the power to select their judges; second, that the provision of compulsory retirement at age 75 is arbitrary and unsound, because many judges at that age are at the peak of their abilities.

In the first point the judge begins with a false premise. He suggests that the people select our judges under the present system. This is clearly not the fact, and later, Judge Clements admits it, "It is a matter of common knowledge that lawyers dominate our judicial conventions . . ." If the judge by judicial conventions refers to conventions concerning our laws and judicial system perhaps he may be right. Who else should dominate the consideration of amending our laws or judicial system? If, however, he refers to party caucuses and nominating conventions then I submit he is wrong. The lawyers do not dominate such conventions or if it should happen that such lawyers as participate in them have the greatest influence such lawyers are not ordinarily representative of the entire bar. Unfortunately perhaps

most lawyers are too busy with practice to be concerned with politics.

To get to the point, candidates for judicial positions are selected by the party leaders, including the perennial office holders, tavern owners and those who dig into their own pockets to finance the campaigns. Under the best of circumstances judicial candidates are agreed upon by party leaders from both parties in order to obtain the best candidates available without reference to party affiliations or rather in an effort to have each party represented. In the past in some judicial districts this system has worked very well but there is now clear evidence in some of the judicial districts along the Eastern slope, including Denver that selection of judges on a party basis is becoming stronger as public opinion on national politics becomes more tense. We cannot go on forever depending on Providence and the interest of party leaders in the public good to maintain a sound judiciary or improve it.

The judge says that the Missouri system is "still in the experimental stage." Actually, it has been in operation for seven years, has been chosen three times by the voters of Missouri, each time with a larger margin of voters favoring it, is being seriously considered in many states as the best and most intelligent method of selecting judicial material. The basic idea of this plan, however, was worked out thirty or forty years ago by the American Bar Association and the American Judicature Society and was officially endorsed by the American Bar Association in 1937. Its origins go back as far as Jeremy Bentham, more than one hundred years ago, who said, "though it is better that judges should not be selected by popular election, the people of their district ought to have the power, after sufficient experience, of removing them from trust." Must we wait another hundred years before we try it?

In the files of the Judiciary Committee are copies of letters from a score of leading lawyers in Missouri, all but two of whom have stated that the system with such faults as it has is worth maintaining and if the issue were presented anew they would vote for it again. An able exposition of the plan appears in the American Bar Association Journal for December, 1947, on page 1, by James M. Douglas, Chief Justice of the Missouri Supreme Court.

Under our present system, I maintain, the voters do *not* select the judges. They merely choose between two or more placed before them by the party leaders. Furthermore, two of the members of our present Supreme Court and fourteen of our twenty-eight district judges were appointed to office by the governor to fill vacancies. In most instances in the history of our state the governor's choice has been good but in some cases very poor judges have been so appointed in Colorado. The judges thus appointed for vacancies were not selected by the people and when they ran for reelection if their records were good the tendency of the voters was to perpetuate them in office, unless there was a political landslide. In that event able judges of the other party fell with their ticket.

What alternative does the Judiciary Committee plan offer, in place of our present system? I submit that it offers a more intelligent method of

selection; not by an anonymous group of men with axes to grind but by a group selected for integrity and interest in maintaining an able judiciary—a group known to all interested enough to read the papers. This group in addition to the laymen appointed by the governor to this responsible position includes lawyers selected by *all* the bar. This group, unlike the unnamed powers behind the political thrones, must bear public responsibility for its choices. There is no scapegoat to be blamed if the choice is wrong. The group is balanced as evenly as possible among the political parties; it has no advantage to obtain except such credit as it may receive for a public service well done. The experience in Missouri over seven years has been that none of the nominating commissions has in any instance failed to nominate an able man.

Is this method not a more logical way to choose a judge? A judge should be a man qualified as an expert in a highly complex and technical field. You do not choose your doctor nor your school teacher by popular vote nor leave the selection of them to the county Republican or Democratic committee. Imagine selecting a state sanitary engineer because he is the winner of a popularity contest. Personally I should rather leave the choice of an expert to the men familiar with his qualifications than to have to flip a coin to decide whether to vote for one unknown candidate or another.

Judge Clements says that a judge under the proposed plan would be "beholden to a small group of men." We now entrust the business of filling vacancies on the bench to the governor without any restrictions upon his selection. The plan contemplates that the initial selection be made by men presumably disinterested in politics and interested in the ability of candidates and that the governor then be required to appoint from among the three nominees so selected. A judge selected under the plan would no more be beholden to the governor than to the commission and in neither case as beholden as a present judge is to the leaders of his political party who succeed in placing him upon the primary ballot.

Furthermore, even if friendship should play a part in a judge's selection, under the plan it would have nothing to do with his keeping his job after he got it. The question of his staying in office would be left to the people. It is common knowledge that past favors are not comparable in influence to expected future favors. A judge selected under the plan would be beholden to no one in the future.

Judge Clements suggests that the plan would "perpetuate a judge in office." This is true only so long as the judge's work is good and if it is why should he not be perpetuated in office? I submit that a judge more than any other public official *should* be perpetuated in office until he reaches an age when in the interest of the public and himself he should be retired. There is nothing novel in the observation that many lawyers of the highest caliber and ability refuse to accept a judicial career simply because they dare not take the financial risk, or do not care to become involved in the unpleasant and sometimes degrading experience of political campaigning. Under the present

system a lawyer with ability must surrender a lucrative practice to go upon the bench and assume the risk that later he will be thrown back upon his own resources without clients, not for any fault of his, but because the political winds have changed. It is not easy to build a new practice after years of absence and at a greater age.

Therefore, I maintain judges should be perpetuated in office to the extent that they are assured if their jobs are well done they will not be tossed out in a national political swing. We must avoid the situation described by a former justice of the Missouri Supreme Court, "I was elected in 1916 because Woodrow Wilson kept us out of war—I was defeated in 1920 because Woodrow Wilson hadn't kept us out of war. I do not believe five per cent of the voters of Missouri ever knew I was on either ticket."

One more point—I submit that judges, unlike policy-making public officials, should *not* be too responsive to the popular demand of the moment. The fact that a law is unpopular does not necessarily make it unwise or unconstitutional. Therefore, the judge who must administer the law regardless of public opinion, to my mind, should not be subservient to public opinion.

A word about Judge Clements' second point in criticism of the plan; that is compulsory retirement of judges at age 75. Of course, there are the Holmeses, the Brandeises, and the Hugheses—but they are the exceptions. There are instances within the experience of all of us of Colorado judges who have continued to serve on the bench after senility has overcome their ability to give the proper public service. With the average man intelligence, vitality or interest may decline before the age of 75 has been reached. Those judges over 75 retired under the plan who are still competent to serve may be called upon by the chief justice as the need arises to fill positions temporarily vacated by the illness or death of another judge. Retirement for age could be left, it is true, to the exercise of some board's discretion but the danger with such a plan is that the board would probably not exercise its discretion except in the most flagrant cases. The committee's plan also proposes to give the judicial council power to remove judges who have been mentally or physically disabled from further service. At present there is no such remedy in our law.

At the close of his article, Judge Clements mentions those reforms which he regards as desirable. Six of the seven changes which he advocates are in the plan, and his seventh one requires judges to run as non-partisans instead of against their record! Of the other features of the plan Judge Clements states that they are "Impractical, radical and unsatisfactory." All of the features of the plan were arrived at by scores of men after more than a year of work, after exploring every field for evidence and information, including all constructive criticisms from the Colorado bar. It seems hardly justifiable that so much work, effort and open-mindedness should be tossed aside by such general words, "impractical, radical and unsatisfactory." Whether they are impractical or not will only be determined by practice; if radical means a departure from the past then indeed they are radical. At the annual conven-

tion they proved satisfactory to three lawyers out of every four.

What do the remaining features of the plan contemplate? First, an integrated court with the chief justice selected for his ability as an administrator to act as a true president of the court. Second, the assurance that so far as possible judges shall be qualified lawyers who know the rules of their business, shall stick to their jobs and keep out of politics and that the chief justice may keep those judges not busy at work. Third, that a judicial council shall be created to study constantly improvements in the laws and procedure and the business of the courts. Fourth, to avoid a present ridiculous procedure of double trials in contested matters in the county court. Fifth, to get rid of the worst stigma of our judicial system, the justice of the peace courts, and place their jurisdiction with able and trained men, namely the county judges, and under magistrates selected by them and under referees appointed by them.

These represent changes and to some all changes are radical. The real question is, is our present system cumbersome and unsatisfactory? Ask the average layman and he will tell you.

"Equal Justice Under Law"

By WAYNE C. WILLIAMS

Of the Denver bar; former Attorney General of Colorado; former Special Assistant Attorney General of the United States.

The truest and best forum for the lawyer is an appellate court in which he can make an oral argument for the rights and interests of his client.

Here is the natural forum for a lawyer and here his forensic talents should show in their highest form.

The court ought to be as anxious to hear a lawyer argue his case orally as the lawyer is to present it.

I have always felt that there was the essence of real wisdom and practical sense in that custom of the United States Supreme Court in ordering oral arguments in practically all cases that come before it.

There seems to be no deviation from this rule of oral argument in all the long history of that greatest of all our courts and state appellate courts may well take a lesson from this wise custom. It is pleasant to note that our own state supreme court is hearing a progressively larger number of oral arguments in recent years.

I undertake to say that there is no satisfactory substitute for an oral argument before an appellate court. The printed brief never can give to a court that clear, full, consideration of the facts and issues of a case that oral arguments make possible. The oral argument clears the air; eliminates dubious theories, extraneous facts and matters and enables the judges to acquire the very best and clearest grasp of what the exact matter in dispute may be. A printed brief may or may not effect this result.

When the lawyer steps before a supreme court to argue his client's cause he is at the height of his professional career—especially if he appears before the greatest of all tribunals, in Washington.

All the above is preliminary to a short study of some great lawyers whom I have heard argue before the United States Supreme Court.

It so happens that I have had the good fortune to listen to many arguments before that great tribunal and make some study of the attitude, mannerisms and form of argument of some of America's greatest lawyers of this generation.

At the very head and front of this numerous galaxy I place Honorable James M. Beck, former Solicitor General of the United States.

He came nearer, to my mind, having all the requirements and qualities of a great lawyer, and was better equipped to argue in that court than any man I have ever heard address the court. Beck had a natural dignity (not stuffy or overbearing or stodgy), and to that he added a very fine, speaking voice; a gracious manner; an unusually fine diction so that his sentences came out freshly carved like a Shakespearen drama and possessing a quality of permanence and beauty that made them shine. You felt you could read the speech in print and that it would read as well as it sounded. Beck was, of course, master of his case. That is the first requisite of any good argument and woe to the lawyer who appears before that court without having mastered every fact, every phase of the law and every possibility of his case. He will find himself in trouble very quickly. That tribunal is *no place* to come unprepared or half-prepared. The distinguished justices will find it out first and quite rightly they will not permit the time of the court to be taken up by a lawyer who isn't getting anywhere in his argument. Chief Justice Taft (who was kindness itself) once stopped an attorney general from a certain state (not Colorado) and said, "My dear sir, you are getting nowhere. You are not enlightening the court and your record is hopelessly mixed. The court wants instruction on the facts and issues but your record and your argument is getting us nowhere. Let the argument stop here and the case be remanded for further testimony."

Nothing could exceed the humiliation and embarrassment of the lawyer to whom these words were addressed but he had it coming and had learned his lesson.

But to return to Beck and his style of argument. He had the faculty of stating a case more clearly in less words than any lawyer I have ever heard. He never used a superfluous word, never ran off into details, never hurried or stumbled; he would make a statement of his case in a few paragraphs and the court would have a composite picture of the whole matter at issue. His style of presentation was a fine subject for study and could be copied by every lawyer at the bar. It has always been a matter of astonishment to me that, when the chance came, Beck was not immediately advanced to the attorney generalship. He had earned it. Probably the next in line for distinc-

tion in oral argument is John W. Davis, also a former Solicitor General of the United States and now probably the accredited leader of the American Bar. Certainly he is the leader of the New York bar and that in itself places him high on the ladder of professional success.

I have heard Davis in several arguments but one in particular I shall not forget. His opponent opened the case and made most serious charge against Davis' clients, claiming they had manipulated the stock of a certain corporation and taken control of the company wrongfully. It was an immense and wealthy New York corporation and the money and other issues sounded like the biggest Wall street business.

I wondered how Davis would meet his opponents. He never cited a single authority, because the case turned on the facts not on the law. Davis began with a casual unhurried calmness that might have disarmed his adversary. He made an analysis of the complaint of the plaintiff, pointed out the true inwardness of the case; showed who was protesting and why and why they had no standing in court and had misconceived their remedy, if they had one. Piece by piece he ripped the plaintiff's case apart and when he had finished the plaintiff was without standing in the court and the court later so held. Davis has a smoothness of delivery, a quiet ease of presentation that disarms hostility or criticism. It is a pleasure to listen to him. He is without fear or resentment or any quality of pugnacious or hostile opposition in his manner of speech. You can't help but listen. And he is crystal clear. No wonder Chief Justice White said to an opponent of Davis, "Of course no one has due process of law when Mr. Davis is on the other side"—probably the neatest and most subtle compliment that court ever gave a lawyer.

Another very great argument that I heard was in the gold coin cases before the Supreme Court. Attorney General Homer S. Cummings presented the case for the government and if he had never appeared before that court on any other occasion he won laurels enough in that argument to stamp him as one of the great forensic champions of this generation. The issue turned on whether the United States Government was compelled to recognize the wording of certain of its obligations and pay certain issues of bonds in gold.

Cumming's opponents had a smart mathematician figure out the results, the losses and the mathematical possibilities if the case were decided for the government and gold need not be paid. It was a beautiful piece of work (mathematically) and was a whole bound volume by itself.

Everyone wondered how Cummings would meet this vast, ponderous, intricate mathematical book of argument. He picked up the book, looked at it with dubious curiosity and said, "If your honor please I shall not comment on this piece of work. It is the illegitimate offspring of a mathematical debauch."

It was a stunning blow. Not even the staid and dignified court could repress a smile. The court room echoed with murmurs and subdued sounds of mirth and the great mathematical argument was crushed in its inception.

Never had a lawyer smashed an elaborate argument with one phrase in such telling fashion as did Cummings in this address.

The fact is that Attorney General Cummings was one of the ablest and greatest of the distinguished lawyers who have occupied that exalted position and he had a grace of manner, a brilliancy of wit, a power of diction that marked him as an unusually gifted man. He was so much more than just a lawyer; so much more than a mere legalistic authority. He could give a light touch to the gravest, heaviest occasion. While his addresses do not smell of the lamp yet he has a literary equality of the legalistic and practical talks made in this intensely practical age.

Once upon a time I heard a New York lawyer carefully ignore a friendly suggestion from a member of the great tribunal—the lawyer was a veteran at the bar—in an appearance before the Supreme Court. Arguing for a certain principle he was interrupted by Justice Van Devanter who, helping him along, suggested a Maryland oyster case which the justice assured him was directly in point and sustained the argument he was making. Instead of courteously thanking the justice the lawyer went steadily ahead with his argument ignoring the friendly suggestion of the jutsice. Presently the justice again volunteered the same suggestion and cited the case. Again the lawyer ignored the remarks of the justice.

This sort of disdain puzzled me and after court had adjourned I asked the veteran clerk why the lawyer did it.

"Oh, he's just an old dog who is down here so often that it makes no difference to him what the justice says," replied the clerk and its still a mystery to me why a lawyer arguing a case before any court could impolitely ignore a friendly citation and corrobative argument from a judge on the bench.

Before I close these reminiscent accounts of great lawyers I have heard let me add something for the benefit of young lawyers who may suddenly be called upon some day to confront and meet in forensic combat this great and formidable court.

In New Mexico vs. Colorado I had the pleasure of listening to one of my staff from the attorney general's office argue a portion of that case and never was an argument better given. Oliver Dean, an assistant to the attorney general, argued the facts of the case, the law points being presented by his colleague.

Dean had never appeared before the Supreme Court of the United States. He was not a prominent lawyer (in a sense) and he had a difficult and intricate set of facts to unravel and present. He had a deep impressive voice, and deliberate manner and was as calm and collected as if arguing before a justice of the peace in Denver. He answered every question the judges asked him in such complete fashion that not one came back to argue with him. I should say that his presentation lacked nothing and was as good an argument on the facts as that tribunal ever heard. Yet he had never before appeared before that great court and never did again, but he was master of his case.

Let me sum up again by saying that, if you are opening the case, first of all present to the court a very brief picture of what the case is about, giving enough facts and enough logic to show what points are involved. This can usually be done in a few paragraphs and the court will then settle back and listen with more understanding of what you are presenting.

Rarely if ever should you quote the court's decisions for there is a very well fortified presumption that the justices know what they said in some previous case.

The lawyer must always be prepared to answer questions from the bench and these questions clarify the issues and give more point to the argument.

In questioning lawyers I especially want to refer to the manner of Justices Jackson and Rutledge. These two eminent justices are models for the manner and style of questioning lawyers from the bench. It is to be hoped that every other justice will follow the style of these two justices—never hostile, pugnacious, argumentative or seeming to seek disputation for its own sake, but asked with deference to the time and trend of thought of the lawyer who is arguing and asked for the obvious purpose of throwing more light on the case.

No citizen, whether he be a lawyer or not, can sit through a session of this great court, hear arguments and not be deeply impressed with the high character, fairness and ability of the great men who sit on that bench. He is certain to grasp more fully the truth of that motto which he read as he walked up the steps into the noble stone building where the court holds its sessions. Let me repeat that motto now—

"EQUAL JUSTICE UNDER LAW."

Lawyers in the Public Service

JUDGE FRANCIS J. KNAUSS is the presiding judge of the civil division of the Denver District Court this year. JUDGE JOSEPH E. COOK is the presiding judge of the criminal division. JUDGE JOSEPH J. WALSH has been transferred to the criminal division and JUDGE HENRY S. LINDSLEY to the civil division.

HAMLET J. BARRY, JR., DAVID V. DUNKLEE, WILLIAM V. HODGES, of Denver, VICTOR HUNGERFORD of Colorado Springs, and ROBERT L. STEARNS of Boulder, are members of the advisory committee of the Columbia Club of Colorado. JUSTIN W. BRIERLY, Denver, is president of the club.

WARWICK M. DOWNING, Denver, has been selected by the Publications Committee of the Mineral Law Section of the American Bar Association to participate in the writing of a volume on oil and gas conservation law. The volume is a cooperative work to be participated in by writers from each jurisdiction.

RALPH L. CARR, Denver, has been appointed by Governor Knous to the Children's Code Commission to study children's law and make recommendations to the legislature. The commission was created under an act passed by the general assembly in 1947, but passed in such a way that there is considerable doubt that the act was passed at all, or is in any way effective. However, the work of the commission is of considerable importance. The laws relating to children are like most other laws of the state—they need to be revised and brought to date.

H. ALLYN HICKS, JR., is second vice-president of the Denver Civic Symphony Society.

L. WARD BANNISTER AND RALPH L. CARR, Denver, directors of the United States Chamber of Commerce, have been appointed to committees of the chamber. Mr. Bannister is a member of the committees on international relations and labor relations, and Mr. Carr is a member of the committee on national resources.

HENRY TOLL, Denver, is deputy sheriff of the Westerners, an organization dedicated to the collection and preservation of Western lore and history.

JOHN C. YOUNG, Colorado Springs, former judge and chief justice of the Colorado Supreme Court is in Neurnberg trying former Wehrmacht officers for war crimes. Judge Young will be in Neurnberg for at least six months, with Mrs. Young. His sons, John Jr. and Rush will carry on the family law firm during their father's absence.

JACOB V. SCHAETZEL was recently elected president of the Legal Aid Society of Denver. JOHN E. GORSUCH is chairman of the board. EDWIN J. WITTELSHOFER and GORDON JOHNSTON are members of the board. PAUL IREY, general counsel, has been appointed to the executive board for the survey of legal aid, a part of the American Bar Association's survey of the American bar, and has been in New York City in connection with this work, for a short time.

New Members of Denver Bar Association

The following persons were admitted to membership in the Denver Bar Association at the January 5, 1948 meeting:

Betty Marie Asher
Thomas Campbell
George W. Currier
James C. Flanigan
Paul M. Hupp
J. Howard Miller
William V. Moore, Jr.
Byron M. Myers
George J. Stemmler
Comora MacGregor Nash
Joseph David Neff
William S. Powers
Arthur Thad Smith

Henrys Address Denver Bar in January and February

Municipal Judge Hubert D. Henry addressed the Denver Bar Association at the January 5, 1948 meeting. He discussed the legal problems involved in mixing gasoline with alcohol. He is a former chairman of the Junior Bar Section of the Colorado Bar Association, and practices alone in his spare moments from the Municipal Court. He is an instructor at Westminster Law School, where he had his legal education.

He is a graduate of Denver University, a member of Sigma Alpha Epsilon fraternity, and a former member of the Colorado General Assembly.

S. Arthur Henry addressed the Denver Bar Association at the February 2, 1948 meeting. His address was the fifth in a delightful series of humorous addresses with which he has been entertaining Denver and Colorado lawyers for several years. His subject was, "An Anthology of Little Known Legal Correspondence." It was very much enjoyed by all. Mr. Henry is a member of the longest named legal firm in the state, Lewis, Grant, Newton, Davis and Henry, which claims several partners whose names are not in the firm name, and two associates. He is a former president of the Denver Bar Association and a former member of the Board of Governors of the Colorado Bar Association. He is attorney for the Denver Public Schoools, and a member of the Board of Trustees of Denver University. He received his legal education at Harvard.

He is a graduate of Denver University, a member of Sigma Alpha Epsilon fraternity, and a former member of the Colorado General Assembly.

Personals

PAUL S. FRIES has removed his offices to 405 Mining Exchange Bldg., Colorado Springs.

LEWIS, GRANT, NEWTON, DAVIS AND HENRY has now officially announced its formation and office consolidation. The merged firm arising out of the firms of Lewis and Grant, and Newton, Davis and Henry, has moved into its new offices at 810 First National Bank Bldg., Denver. Members of the firm are: Mason A. Lewis, Mayor Quigg Newton (on leave of absence), Richard H. Davis, S. Arthur Henry, Irving Hale, Jr., Donald S. Graham, Donald S. Stubbs, and associates John N. Adams and Byron R. White.

JOHNSON AND ROBERTSON, consisting of Stanley H. Johnson, Donald B. Robertson, and its new associates Cecil M. Draper and James B. Young, has removed its offices to the Tramway Bldg., 1100 Fourteenth St., Denver.

EDWARD L. WOOD, BURTON CRAGER and WILLIAM K. RIS have associated under the name of Wood, Crager and Ris, with offices at 200 Equitable Bldg., Denver. Robert M. Johnson is associated.

PAUL A. JOHNSON has removed his offices to 305 Flatiron Bldg., Denver.

ERNEST B. FOWLER *and* CHARLES C. NICOLA have associated under the name of Fowler and Nicola, with offices at 803 Ernest and Cranmer Bldg., Denver.

CHARLES E. GROVER, formerly deputy district attorney in Denver, has resigned to enter private practice. He will maintain law offices with Forest C. Northcutt in the First National Bank Bldg., Denver.

Letters to the Editor

Re Worth Allen's quotation (December 1947 Dicta, page 274) from Justice Burke's condemnation of "and/or" I refer you to "Dictaphun", in July, 1937, Dicta where it is pointed out that "and/or" appears in the text of the opinion in an en banc decision by the Colorado Supreme Court to which no objection by Justice Burke was noted. The case is *Kolkman vs. People*, 89 C. 8, 21.

There are situations in which the use of "and/or" is proper. The fact that it may be frequently improperly used is no reason for wholesale condemnation.

Yours very truly,
CARLE WHITEHEAD.

Committee on Unlawful Practice Needs Information

The Unlawful Practice Committee of the Colorado Bar Association wishes to ascertain from the members of the association whether there are problems in this field that call for action and whether there are programs or policies that the various members of the bar might care to recommend.

Among the classifications of the American Bar Association having to do with unlawful practice are the following:

(a) Real estate brokers.
(b) Banks and trust companies.
(c) Insurance adjusters.
(d) Underwriters.
(e) Actors' agents.
(f) Notaries public.
(g) Persons practicing before administrative tribunals.
(h) Persons soliciting and preparing naturalization papers.
(i) Accountants and lay persons preparing instruments and giving advice generally in regard to tax matters.
(j) Members of the bars of other states or those licensed solely in the federal courts who maintain offices in a particular state and give advice and services of a legal nature but who are not members of the state bar.

All members of the Colorado bar are urged to write their suggestions to Charles A. Graham, Symes Bldg., Denver, chairman of the committee.

Denver Bar Considers Two Important Subjects

At the February meeting of the Denver Bar Association, two important matters were presented. Edwin J. Wittelshofer, chairman of the Real Estate Title Standards Committee, recommended the repeal or amendment of the Soldiers' and Sailors' Civil Relief on the grounds that the provisions which are now preventing unqualified opinions relating to titles have served their purpose and are no longer necessary. The association agreed with him and adopted a resolution recommending the repeal or amendment of the act.

A committee presented a recommendation relating to the justice of the peace courts in Denver. It was proposed that the municipal court be increased by two judges and that there be four justices of the peace in Denver. It was further proposed that the same four men who hold the office of municipal judge also be appointed justice of the peace, but waive their salaries as justice of the peace. Two of the municipal judges would continue to hear cases involving ordinance violations, and two of them would hear the usual justice of the peace cases. However, additional benefits would result to litigants by giving two more justices of the peace to which changes of venue could be taken if the first two changes of venue authorized by law were taken. At present, in such cases, the suit must be dismissed. The matter was referred to another committee for further study and report.

Upon Information and Belief

Attorneys' Fees Should Be Recoverable

The time has come for the bar to consider and take a firm stand on the subject of the recoverability of attorneys' fees. It has not been the custom in this country to permit attorneys' fees to be recovered, and apparently this philosophy has been adopted for the purpose of discouraging unwarranted litigation and for the purpose of encouraging settlement of disputed claims. This has apparently worked well for a large number of years, but it does not work well now in view of certain present conditions. Litigiousness has never been considered a virtue but the denial of attorneys' fees results in the denial of justice in connection with small liquidated claims.

The first case which comes to mind is the minor auto accident or street car accident. The damage done is $50 or less, and the amount of damage is easily ascertained—it is the repair bill for the car. The responsible party refuses to pay the claim, and the injured party wants to know what to do. Either the prospective defendant is insured, and the insurance carrier refuses to pay the claim, or the defendant refuses to pay, period. What is the prospective plaintiff to do? His only recourse is suit. How much will it cost? Well, he will have to advance court costs. In addition, the attorney must request at least $15 for an attorney's fee—and the attorney will lose money at that.

If the plaintiff decides to advance the costs and fee, the attorney starts suit—the plaintiff realizing, of course, that the attorney's fee will be totally

lost to him. A hearing is had in the justice court and the plaintiff wins. The plaintiff thinks he has not had such a bad deal, as he has only been out $15, and is not too much displeased. Then the plaintiff is made to realize the power in litigation of a wealthy defendant. He finds the case has been appealed to the county court. What does his attorney recommend?

Well, if the attorney is to represent him in the county court and make any kind of a charge the attorney's fee will be more than the difference between what he had already paid and the maximum amount recoverable. It's a complete loss for the plaintiff now—his damage of $50, plus his costs of $5, plus his attorney's fee of $15. He is thru. But by this time the attorney may see a public duty and tell plaintiff he will represent him without further charge. So the case is tried in the county court, and the plaintiff wins. An appeal is immediately taken to the Supreme Court. At this time both plaintiff and attorney throw in the towel.

But why has the defendant made such a vigorous defense in a claim which must surely result in victory for the plaintiff if carried to its final conclusion? Just this, poor innocent—if this plaintiff is allowed to get away with this suit other plaintiffs may try it, and that would wreck the defendant's policy of refusing to pay small claims.

Now let's take case number two. In this case plaintiff, with a very weak case, sues defendant because his attorney has taken the case on a contingent fee basis, and all the plaintiff is out is his court costs. The attorney in this case is giving his time, but he has plenty of it. The amount of posible recovery is $1000. Defendant consults an attorney. The attorney examines the claim and advises the defendant that the claim is baseless and recommends that it be defended against. The cost? Oh, yes, the cost. Well, that will take about three days of office work in preparing for trial. It will take at least two full days of trial. In addition we can expect several motions from the plaintiff, all of which will have to be argued, and possibly some other items requiring attorney's services, such as taking depositions, interviewing witnesses, etc. The attorney's fee could very easily run to $500. If you can settle the claim for $250, you are better off financially, even though the litigation is nothing more than legalized piracy.

Now let's examine these cases in the light of the recoverability of attorney's fees. Case number one. The claim is $50. The claim is not paid on demand. Suit is commenced. If the plaintiff is successful, the trial court awards an attorney's fee of $50. If an appeal is then taken, and won by the plaintiff, the county court awards an additional attorney's fee of $100. If an appeal is taken to the Supreme Court, an additional attorney's fee is awarded by that court, on affirmation of judgment, of $350. The plaintiff has been made whole, and his attorney has been reasonably compensated. The defendant has found an unworthy defense of a just claim expensive. On the other hand, the defendant has not been prejudiced because, had the defendant won the litigation, his attorney's fees would have been paid by the plaintiff, and he would not have suffered any loss in defending an unjust claim.

How about case number two? It isn't undertaken by the plaintiff because he does not want to have to pay the attorney for the defendant when he loses his case, but if he does undertake the litigation, he will have the attorney's fees of the defendant to pay, and he can not hope for any offer of settlement because the defendant knows he has a good defense, and that the plaintiff will have to pay his attorney if the defendant wins.

If we believe in justice and believe that an unjust demand cannot be made by others without having to pay the consequences, we should believe in the policy of allowing attorneys' fees to be recovered by the winning party. We sincerely hope that the Colorado bar, at the next session of the legislature, will sponsor legislation permitting attorneys' fees to be recovered by the winning party as a part of the costs. We do not object to reasonable safeguards, but we do feel that the bar will shirk its duty to the public if it does not sponsor such legislation, and as a result of its failure will permit the public to lose confidence in the bar as a whole, because a limited number of its members engaged in the practice of defending debtors who refuse to honor legitimate small claims or represent litigants who sue without just cause.

Admitted to a Higher Court

HARRY S. CLASS, Denver, died February 24 of a heart attack. He was 74. He was born in Norton, Kansas, and came to Denver at the age of 8. He returned to Norton, where he finished high school, at which time he returned to Denver. He was clerk of Adams County until his election as county judge in 1908. After serving one term he was elected district judge, serving in that capacity until 1918. In recent years he has been practicing in Denver.

Reese McCloskey

Requiem Address of James M. Noland

We of the profession of Reese McCloskey, we to whom came the privilege of close friendship, and of business and social association with him, have a distinct feeling that with the passing of this brother attorney has come the end of an era in Southwestern Colorado. The history of the development of this section of our state is so inextricably interwoven with the professional life of the dean of our bar that one cannot be related without the other. It is a period that had its beginning in 1886, when a fledgling lawyer, aged 25 years, a recent graduate of Lafayette University of Easton, Pennsylvania, drove his team and wagon up the Animas Valley, thru Hermosa Park, and into the new boom town of Rico, Colorado. There he unloaded his dog-eared Blackstone, his few personal belongings, and began to make legal history for the San Juan basin and Colorado. Hard rock miners were staking out their claims, digging, tunneling, drifting and finding themselves becoming increasingly enmeshed in disputes for which there was no help in legal precedent. The great body of mining law was then, in Rico and similar camps, being born. Reese McCloskey was there present at the birth and with his magnificent mind continued to nurture the infant to a full maturity which gave it top rank among

the mining states of the Union. Many times was the voice of this young attorney heard in the Supreme Court of Colorado and of the United States, and many times the law of mining rights which he argued became the final opinion of the judges.

The increasing activity among the mines of all the San Juan district necessitated the early removal of the new lawyer to Durango. Here he met and fell in love with Mabel Downs, to whom he was married in 1892, and thus began a devoted comradeship which ended only with Mrs. McCloskey's death 42 years later in 1934.

The increasing production of metals brought the need for transportation to the markets, and now youthful Reese McCloskey lent his mental and physical aid to the next momentous development of our section—the coming of the railroads. Thru all this virgin territory driving his team and wagon, sometimes camping for the night on the river bank, sometimes for the week in the snow drifts, Reese, as he came to be known, went gathering the right-of-way agreements that permitted the laying of the steel rail—which in turn brought the outside world to our doorstep, and took our gold and silver, our cattle and sheep, our hay and grain to the world.

Followed then the farmer, who found that here in our country his old accustomed plains methods of growing crops failed to produce. He must have water, and there it was in the mountain streams, but what about his rights to that water? He called Reese—his neighbors called him. And soon this lawyer and his pioneer colleagues were writing new doctrines for the law books. "First in time, first in right" became the basis of the hitherto unknown law of irrigation which was to become and remain the life of the arid western states. Throughout his lifetime, although never forsaking his first love of mining law and railroad transportation, Reese McCloskey devoted his talents and his labors to the equitable distribution of the life sustaining waters of the mountains, and became a recognized national authority in that branch of jurisprudence.

And so, the era of Reese McCloskey and his astute legal mind has come to an end! It would be folly to say that this great San Juan Empire could not have reached its present state of development had not this man lived amongst us. But we who came here as young lawyers when even then Reese McCloskey was growing grey—we who have listened to him in the court-room, and in his office, and on the street corner—we who have viewed his mental powers with a feeling akin to reverence—have cause to doubt that the paths of mining law, western railroading and irrigations would have been so clear cut and easily discernible had not this friend first broken the legal trail thru the forest.

To you, Reese, the pioneers of all the San Juan with whom you worked and fought along the way, the newer generation of miners and farmers whose burdens have lessened by your having lived, the lawyers, old and young, who have profited by sitting with you or against you at the counsel table—say "Hail and farewell!" and may you have the rest and peace to which you are entitled.